A **KARUPPANNAN RAMASAMY & ANOR**

v.

ELIZABETH JEEVAMALAR PONNAMPALAM & ORS; SUNDARAM MARAPPA GOUNDAN & ANOR (INTERVENERS); RAYA REALTI (THIRD PARTY) & ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
C ALAUDDIN MOHD SHERIFF PCA
ABDUL AZIZ MOHAMAD FCJ
[CIVIL APPEAL NOS: 02-39-2007 (W) & 02-40-2007 (W)]
8 JUNE 2009

D ***LAND LAW:*** *Sale of land - Option - Specific performance - Two options to purchase given to two different parties - Private caveat - Payment of deposit - Estoppel - Effect of exercise of first option - Pleadings and evidence - Whether second option subject to first option - Conditional option*

E ***CONTRACT:*** *Sale and purchase of land - Option - Specific performance - Two options to purchase given to two different parties - Private caveat - Payment of deposit - Estoppel - Effect of exercise of first option - Pleadings and evidence - Whether second option subject to first option - Conditional option*

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This case concerned certain land in Cameron Highlands belonging to the six defendants, who had appointed Raya Realti, a firm of real estate agents, to sell the land at RM30,000 per acre. The crux of the matter pertained to options to purchase the land at
G RM28,000 per acre given by Raya Realti to the intervener-plaintiffs ('first option') and the plaintiffs ('second option'). The plaintiffs had also lodged a private caveat on the land after obtaining the second option. Both the intervener-plaintiffs and the plaintiffs brought actions against the six defendants for specific
H performance. The trial judge found the six defendants liable for breach of contract, and ordered specific performance for the intervener-plaintiffs and damages for the plaintiffs. The six defendants appealed against the entire decision of the High Court, while the plaintiffs cross-appealed for specific performance. The
I Court of Appeal found that there was no binding or concluded

contract in favour of the plaintiffs and intervener-plaintiffs, and set aside the order of specific performance for the intervener-plaintiffs and the award of damages for the plaintiffs; the plaintiffs' cross-appeal for specific performance was dismissed. These were the appeals by the intervener-plaintiffs and the plaintiffs against the decision of the Court of Appeal. In respect of the interverner-plaintiffs' appeal, the following questions required consideration: (i) Whether after the grant of an option to purchase land a vendor can unilaterally repudiate the option, after the due exercise of the option, on the ground that a caveat has been lodged by a third party; (ii) whether an acceptance by the vendor of a sum that is marginally less than the strict calculation of 10% of the purchase price constitutes a waiver of the marginal difference and estops the vendor from raising the said non-payment of the said marginal difference as a defence to specific performance; and (iii) whether in any case, the *de minimis* rule applies to such a marginal difference. For the plaintiffs' appeal, the following questions needed determination: (i) When a sale and purchase of land is by way of an oral agreement and such transaction is done through an option to purchase whether such an option to purchase can be treated merely as evidence which does not require to be specifically pleaded; (ii) in a case of sale and purchase of land, when there are two options given by the vendor to two different parties, can the one option be treated as conditional upon non-performance of the other option; and (iii) whether the court is entitled to rely on the opinion of a text book to arrive at a finding of fact as to when a cheque is cleared.

Held (allowing the intervener-plaintiffs' appeal; dismissing the plaintiffs' appeal)

Per Abdul Aziz Mohamad FCJ delivering the judgment of the court:

(1) In regard to Questions (ii) and (iii) of the intervener-plaintiffs' appeal, the intervener-plaintiffs' counsel went to great lengths to point out various circumstances showing that the parties had always proceeded on the basis that the sum of RM35,000 was acceptable as full satisfaction of 10% of the total purchase price. It was clear that that was the case, amounting to a waiver of RM35; if not, the six defendants would have raised the deficiency as a defence. The facts also showed that Raya Realti, as the six defendants' agent, was not concerned

A to fix the deposit at the exact sum of RM35,035. Question (ii) would therefore be answered in the affirmative, and there was no need to answer Question (iii). (paras 22 & 23)

(2) As for Question (i) of the intervener-plaintiffs' appeal, provided B the option had been exercised in time, there was a binding contract, and the lodging of the caveat did not entitle the six defendants to refuse to proceed with the sale. On the facts, all that the intervener-plaintiffs had to do to exercise the option and turn it into a binding or absolute contract was to C tender payment of the 10% deposit by 18 October 1988, which they did. That the six defendants' solicitors chose not to bank in the cheques but instead to return them to Raya Realti did not change the fact that the option had been exercised. The return of the cheques did not signify that there D was no "acceptance" of the 10% deposit. The intervener-plaintiffs' appeal should, therefore, be allowed. (paras 26 & 27)

(3) In respect of the plaintiffs' appeal, Question (i), which was E predicated primarily on the existence of an oral agreement, might be answered in the affirmative as a general question, but the answer could not serve the plaintiffs' case because there was no oral agreement or sale and purchase by way of an oral agreement in their case. Nevertheless, the trial judge was right F in not paying heed to this pleading issue. The purpose of a pleading is to enable the other party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. G In this case, the plaintiffs' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the outset, they knew that it was the second option that was the true basis of the plaintiffs' claim. This was nothing but a trivial issue. (paras 36 & 37)

H **(4)** With regard to Question (ii) of the plaintiffs' appeal, on the facts of this case, since the second option was subject to the first option and since the first option was exercised in time, the second option ceased to be binding on the six defendants. Question (ii) was actually inappropriate for this case. It I assumed, without more, the existence of two options given to

two different parties. It overlooked the fact that in this case, as the Court of Appeal found, one option was in fact conditional. As it stood, the question might well be answered in the negative. But one option could, as in this case, be made conditional upon the non-exercise of the other. Indeed it was important that it should be so made, so that the vendor would not end up being liable to two purchasers. Therefore, the plaintiffs' appeal ought to be dismissed without having to deal with Question (iii), which related to the question of payment of the 10% of the total purchase price by the plaintiffs. (paras 44, 45 & 46)

(5) Since the outcome of these appeals was that the plaintiffs failed in their claim and the intervener-plaintiffs succeeded in theirs, it followed that the plaintiffs' appeal against the Court of Appeal's dismissal of their cross-appeal in the Court of Appeal for specific performance automatically failed, and there was no need to consider the submissions of the question who, as between the plaintiffs and intervener-plaintiffs, should be granted specific performance. (para 47)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Kes ini berkenaan dengan tanah tertentu di Cameron Highlands yang dimiliki oleh keenam-enam defendan, yang telah melantik Raya Realti, satu firma agen harta tanah, untuk menjual tanah itu pada harga RM30,000 seekar. Pokok persoalan ini berhubungan dengan opsyen untuk beli tanah itu pada harga RM28,000 yang diberi oleh Raya Realti kepada pencelah-plaintif ('opsyen pertama') dan plaintif ('opsyen kedua'). Plaintif juga telah meletakkan suatu kaveat persendirian atas tanah itu selepas memperolehi opsyen kedua. Kedua-dua pencelah-plaintif dan plaintif memulakan tindakan terhadap keenam-enam defendan untuk pelaksanaan spesifik. Hakim perbicaraan telah mendapati keenam-enam defendan bertanggungjawab atas pemungkiran kontrak, dan telah mengarahkan pelaksanaan spesifik untuk pencelah-plaintif dan ganti rugi untuk plaintif. Keenam-enam defendan merayu terhadap keseluruhan keputusan Mahkamah Tinggi, sementara plaintif telah merayu-balas untuk pelaksanaan spesifik. Mahkamah Rayuan mendapati bahawa tiada apa-apa kontrak yang mengikat atau selesai yang berpihak kepada plaintif dan pencelah-plaintif, dan

telah mengenepikan perintah pelaksanaan spesifik untuk pencelah-plaintif dan award ganti rugi untuk plaintif; rayuan-balas plaintif untuk pelaksanaan spesifik telah ditolak. Ini merupakan rayuan-rayuan oleh pencelah-plaintif dan plaintif terhadap keputusan Mahkamah Rayuan. Berkenaan dengan rayuan pencelah-plaintif, soalan-soalan berikut perlu dipertimbangkan: (i) Sama ada selepas memberi opsyen untuk beli tanah sesuatu penjual boleh menolak secara satu pihak opsyen itu, selepas perlaksanaan opsyen itu, atas alasan bahawa suatu kaveat telah diletak oleh pihak ketiga; (ii) sama ada penerimaan oleh penjual sesuatu jumlah yang kekurangan sedikit dari pengiraan tepat 10% harga belian merupakan suatu penepian kekurangan sedikit itu dan mengestop penjual dari membangkitkan ketidakbayaran kekurangan sedikit itu sebagai pembelaan kepada pelaksanaan spesifik; dan (iii) sama ada walau apa pun, kanun *de minimis* terpakai untuk kekurangan sedikit sebegitu. Bagi rayuan plaintif, soalan-soalan berikut perlu ditentukan: (i) Apabila suatu jual beli tanah dibuat secara perjanjian lisan dan transaksi itu dibuat melalui satu opsyen untuk beli sama ada opsyen untuk beli itu boleh dianggap sebagai hanya keterangan yang tidak perlu diplid dengan spesifik; (ii) dalam suatu kes jual beli tanah, apabila ada dua opsyen yang diberi oleh penjual kepada dua pihak yang berlainan, bolehkah satu opsyen itu dianggap sebagai bersyarat atas ketaklaksanaan opsyen yang satu lagi; dan (iii) sama ada mahkamah berhak bergantung pada pendapat suatu buku teks untuk mencapai suatu dapatan fakta mengenai bila sesuatu cek telah diluluskan.

Diputuskan (membenarkan rayuan pencelah-plaintif; menolak rayuan plaintif)

Oleh Abdul Aziz Mohamad HMP menyampaikan penghakiman mahkamah:

(1) Berkenaan dengan Soalan-soalan (ii) dan (iii) rayuan pencelah-plaintif, peguam pencelah-plaintif telah mencuba dengan sedaya upaya menunjukkan beberapa halkeadaan yang membuktikan bahawa pihak-pihak telah meneruskan berdasarkan bahawa jumlah RM35,000 itu boleh diterima sebagai pelaksanaan penuh 10% seluruh harga belian itu. Ia adalah jelas bahawa itu merupakan kesnya, iaitu satu penepian sebanyak RM35; jika tidak, keenam-enam defendan akan membangkitkan kekurangan itu sebagai pembelaan. Fakta-fakta juga menunjukkan bahawa Raya Realti, sebagai agen keenam-enam defendan, tidak endah

menetapkan deposit itu pada jumlah yang tepat RM35,035. Soalan (ii) oleh itu akan dijawab secara afirmatif, dan Soalan (iii) tidak perlu dijawab.

(2) Bagi Soalan (i) rayuan pencelah-plaintif, jika opsyen itu telah dilaksanakan dalam masa yang disediakan, terdapat suatu kontrak yang mengikat, dan peletakkan kaveat itu tidak memberi hak kepada keenam-enam defendan itu untuk tidak meneruskan dengan jualan itu. Berdasarkan fakta, apa yang hanya perlu dibuat oleh pencelah-plaintif untuk melaksanakan opsyen itu dan mengubahnya kepada suatu kontrak yang mengikat atau mutlak ialah untuk memberi deposit sebanyak 10% sebelum 18 Oktober 1988, yang mana mereka telahpun buat. Bahawa peguamcara keenam-enam defendan tidak memilih untuk masukkan cek-cek itu dalam bank tetapi untuk memulangkan mereka kepada Raya Realti tidak mengubahkan fakta bahawa opsyen itu telah dilaksanakan. Pemulangan cek-cek itu tidak membuktikan bahawa tidak ada "penerimaan" deposit sebanyak 10% itu. Rayuan pencelah-plaintif, oleh itu, harus dibenarkan.

(3) Berkenaan dengan rayuan plaintif, Soalan (i), yang berasaskan terutamanya atas kewujudan suatu perjanjian lisan, boleh dijawab secara afirmatif sebagai soalan am, tetapi jawapannya tidak menolong kes plaintif kerana tidak ada perjanjian lisan atau jual beli melalui perjanjian lisan dalam kes mereka. Walau bagaimanapun, hakim perbicaraan telah membuat keputusan yang betul apabila tidak mengendahkan isu pliding ini. Tujuan suatu pliding ialah untuk membolehkan pihak bertentangan mengetahui kes yang tepat yang beliau perlu berdepan dengan. Sesuatu kecacatan dalam pliding yang tidak memeranjatkan atau menyusahkan atau memprejudiskan pihak bertentangan tidak seharusnya menjejaskan kes pihak yang membuat pliding itu. Dalam kes ini, kegagalan plaintif untuk memplid opsyen itu tidak menyusahkan atau memprejudiskan keenam-enam defendan dalam apa-apa cara pun. Dari permulaan, mereka tahu bahawa opsyen kedua yang merupakan asas sebenar tuntutan plaintif. Ini hanya sesuatu isu yang remeh-temeh.

(4) Berhubungan dengan Soalan (ii) rayuan plaintif, berdasarkan fakta kes ini, oleh kerana opsyen kedua itu tertakluk kepada opsyen pertama dan disebabkan opsyen pertama itu dilaksanakan dalam masa yang cukup, opsyen kedua itu

berhenti menjadi mengikat atas keenam-enam defendan. Soalan (ii) sebenarnya tidak sesuai untuk kes ini. Ia membuat andaian, lebih lagi, kewujudan dua opsyen yang diberi kepada dua pihak berlainan. Ia tidak mempertimbangkan fakta bahawa dalam kes ini, seperti yang didapati oleh Mahkamah Rayuan, satu opsyen sebenarnya bersyarat. Memandangkan keadaan kes ini, soalan ini boleh dijawab secara negatif. Tetapi suatu opsyen boleh, seperti dalam kes ini, dijadikan bersyarat atas ketaklasanaan opsyen yang satu lagi. Ia sepatutnya dijadikan sebegitu, supaya penjual tidak pada akhirnya menjadi tanggungjawab kepada dua pembeli. Oleh itu, rayuan plaintif seharusnya ditolak tanpa perlunya mempertimbangkan Soalan (iii), yang berkaitan dengan soalan pembayaran 10% keseluruhan harga belian oleh plaintif.

(5) Oleh kerana kesimpulan rayuan ini ialah bahawa plaintif telah gagal dalam tuntutannya dan pencelah-plaintif telah berjaya, ia berterusan bahawa rayuan plaintif terhadap penolakan rayuan-balas mereka oleh Mahkamah Rayuan dalam Mahkamah Rayuan untuk pelaksanaan spesifik gagal secara automatik, dan tidak ada keperluan untuk mempertimbangkan hujahan-hujahan mengenai soalan siapa, di antara plaintif dan pencelah-plaintif, seharusnya diberi pelaksanaan spesifik.

[Diperintah sedemikian.]

Case(s) referred to:
Subramaniam Chettiar & Ors v. JC Chang Ltd [1969] 2 MLJ 176 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

(Civil Appeal No: 02-39-2007 (W))
For the plaintiffs - Mura Raju; M/s Mura Raju & Co
For the defendants - Dato' Bastion Pius Vendargon (Dennis Appadurai with him); M/s Dennis Nik & Wong

(Civil Appeal No: 02-40-2007 (W))
For the intervener-plaintiffs - DP Vijandran (Susan Joseph with him); M/s Azman Joseph & Assoc
For the defendants - Dato' Bastion Pius Vendargon (Dennis Appadurai with him); M/s Dennis Nik & Wong

For the third party - Prasad Abraham; M/s Prasad Abraham & Assoc

[Appeal from Court of Appeal, Civil Appeal No: W-02-728-2003]

[Editor's note: For the Court of Appeal judgment, please see Elizabeth Jeevamalar Ponnampalam & Ors v. Karuppannan Ramasamy & Anor; Sundram Marappa Goundan & Anor (Interveners); Raya Realty (Third Party) [2007] 3 CLJ 465.]

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad FCJ:

[1] This case concerns a land in Cameron Highlands measuring 12 acres 2 roods 2 poles (12.5125 acres) belonging to six persons who became defendants in this case and who will therefore be referred to as "the six defendants". On 5 October 1988 they appointed Raya Realti, a firm of real estate agents, to sell the land at RM30,000 per acre.

[2] On 9 October 1988 Raya Realti gave to two persons a written option to purchase the land at RM28,000 per acre. The option was to be exercised by 18 October 1988 by paying ten per cent of the total purchase price. The total purchase price was not stated in the option, but since the land measures 12.5125 acres, the total purchase price would be RM350,350, and ten per cent of it would be RM35,035. The two persons were Sundaram a/l Marappa Goundan and Sinnan a/l Kandan. The option given to them will be referred to as "the first option".

[3] On 10 October 1988 Raya Realti gave to two other persons another written option to purchase the same land at RM28,000 per acre. The option was to be exercised by 25 October 1988 by paying ten per cent of the total purchase price, which would also be RM35,035. The two persons were Karuppannan a/l Ramasamy and Amchiappan a/l Sellapan. As they became the plaintiffs in this case, they will be referred to as "the plaintiffs". The option given to them will be referred to as "the second option".

[4] On 15 October 1988, five days after obtaining the option, the plaintiffs lodged a private caveat on the land.

[5] On 19 October 1988 the solicitors for the six defendants, Skrine & Co., returned two cheques to Raya Realti for onward transmission to the aforesaid Sundaram and Sinnan, holders of the

first option, saying in their letter that their clients were not proceeding with the sale of the land unless and until the plaintiffs' private caveat was removed. The two cheques totalled RM35,000, each being for RM17,500, and were cheques for paying ten per cent of the total purchase price.

[6] On 4 November 1988 the plaintiffs, maintaining that before 25 October 1988, the date of expiry of the second option, they had paid to Raya Realti slightly more than ten per cent of the total purchase price, namely, RM36,400, and alleging that the six defendants and Raya Realti had refused to complete the agreement for sale, brought an action against the six defendants and Raya Realti, who became the seventh defendant, for specific performance, or, alternatively, for damages for breach of contract. Against the plaintiffs' claim, the six defendants pleaded as their defences that the giving of the option was not done in the course of Raya Realti's employment as their agent, that Raya Realti were not authorized to sell the land at a price lower than RM30,000 per acre, that the option given to the plaintiffs was a conditional option because before granting it Raya Realti had represented to them that it was subject to the prior rights of Sundaram and Sinnan under the first option, and that the plaintiffs did not exercise the option before its expiry on 25 October 1988. The six defendants counterclaimed against the plaintiffs for removal of their caveat and for damages on account of the caveat.

[7] In June 1991, by way of third-party proceedings, the six defendants brought a claim against Raya Realti for damages for granting to the plaintiffs the second option to sell the land at RM28,000 per acre whereas the authorized price was RM30,000 per acre and for granting the option when there was already a valid option, the first option, granted to Sundaram and Sinnan. Sinnan had died in January 1991.

[8] In 1998, when the trial of the action had proceeded a little way, Sundaram and Sinnan's widow, Palaniammah a/p Muthan, as administrator of Sinnan's estate, came into the action as intervener-plaintiffs and filed their statement of claim, which was against the six defendants, on 2 July 1998. For convenience, we will speak of the intervener-plaintiffs as referring also to Sinnan. The intervener-plaintiffs contended, *inter alia*, that the option given to them, the first option, had been exercised before its expiry on 18 October 1988 by the payment of RM35,000 on 9 and 15

October 1988, and averred that the six defendants no longer wished to proceed with the sale of the land. The intervener-plaintiffs prayed for an order of specific performance against the six defendants. Against the intervener-plaintiffs' claim, the defences that the six defendants pleaded were essentially that Raya Realti were not their agent, or, alternatively, that Raya Realti were not authorized to sell the land at a price lower than RM30,000 per acre.

[9] In January 1999, by way of third-party proceedings, the six defendants brought a claim against Raya Realti for damages for granting to the intervener-plaintiffs the first option when they were not an agent or employee of the six defendants or, alternatively, for granting the option to purchase at RM28,000 per acre whereas the authorized price was RM30,000 per acre.

[10] The learned trial judge found, as regards the plaintiffs' claim, that they had exercised the second option before the deadline of 25 October 1988 by paying RM34,600 into Raya Realti's bank account and that therefore there was a concluded contract. The learned judge did not deal with the defence as to Raya Realti's authority but we would assume, from the finding of a concluded contract, that he accepted that Raya Realti had the six defendants' consent to sell the land at RM28,000 per acre.

[11] As regards the intervener-plaintiffs' claim, the learned trial judge specifically found as a fact that the six defendants agreed to the price of RM28,000 per acre, thereby impliedly finding that Raya Realti were the six defendants' agent. He found there was a concluded contract.

[12] The learned trial judge therefore found that the six defendants were liable both to the plaintiffs and the intervener-plaintiffs for breach of contract, but since it was the intervener-plaintiffs who were the first to be given an option, he ordered specific performance against the six defendants in favour of the intervener-plaintiffs and only awarded damages for the plaintiffs against the six defendants and also against Raya Realti the seventh defendant. He consequently dismissed the six defendants' third-party claims against Raya Realti and counterclaim against the plaintiffs as regards the caveat.

A **[13]** The six defendants appealed to the Court of Appeal against the entire decision of the High Court, that is to say, the orders made against them in favour of the plaintiffs and the intervener-plaintiffs and the consequent dismissal of their third-party claims against Raya Realti and counterclaim against the plaintiffs. The B plaintiffs cross-appealed for specific performance. Raya Realti cross-appealed against the award of damages against them as the seventh defendant in favour of the plaintiffs.

[14] The Court of Appeal found there was no binding or C concluded contract in favour of the plaintiffs and intervener-plaintiffs and therefore allowed the six defendants' appeal and set aside the award of damages and the order of specific performance. Consequently the appeal on their counterclaim against the plaintiffs was allowed and the plaintiffs' private caveat was ordered to be D removed and damages on account of the private caveat were ordered, and the plaintiffs' cross-appeal for specific performance was dismissed. The Court of Appeal dismissed the six defendants' appeal against the dismissal of their third-party claims against Raya Realti, finding that in any case they had apparent or ostensible E authority to bind the six defendants to a lower price of RM28,000 per acre. The Court of Appeal made no mention in their judgment of Raya Realti's cross-appeal against the award of damages against them in favour of the plaintiffs.

F **[15]** Only the plaintiffs and intervener-plaintiffs applied for and obtained leave to appeal to this court. The plaintiffs' appeal is appeal No. 39, and is directed also against the dismissal of their counterclaim for specific performance, and the intervener-plaintiffs' appeal is appeal No. 40. There is no appeal by the six G defendants, so that the question of their third-party claims against Raya Realti does not arise in the present appeals. The plaintiffs' appeal is directed against the six defendants only, so that the question of damages for the plaintiffs against Raya Realti does not arise in the present appeals. In short, as their counsel, who was H present during the hearing of the appeals, said, Raya Realti are not jeopardized by these appeals.

[16] After the appeals had reached this court the second intervener-plaintiff, the widow and administrator of the estate of Sinnan, died on 2 October 2008, and their son, Selva Balan a/l I Sinnan, has now been substituted as the second intervener-plaintiff-appellant.

The Intervener-Plaintiffs' Appeal

[17] We shall deal first with the intervener-plaintiffs' appeal. For this appeal, the following facts need to be set out, some of which have been mentioned earlier.

[18] The intervener-plaintiffs' option, the first option, was dated 9 October 1988. It was to be exercised by 18 October 1988 by paying ten per cent of the total purchase price, which, although this was not stated in the option, would come to RM350,350. Ten per cent of that would strictly be RM35,035. A cheque for RM17,500 was acknowledged in the option as having been received. It was in the name of Raya Realti, the six defendants' agent. It was dated 9 October 1988. Another cheque of the same date, also for RM17,500, was issued in the name of Skrine & Co., the six defendants' solicitors. The cheque in the name of Raya Realti was paid into Raya Realti's client's account and Raya Realti issued a client's account cheque dated 15 October 1988 for RM17,500 in the name of Skrine & Co. By 15 October 1988, therefore, Skrine & Co. were in possession of two cheques for RM35,000 on behalf of the six defendants. It was RM35 less than the exact ten per cent of the total purchase price. That was three days before the last date for the intervener-plaintiffs to exercise the option. On 19 October 1988 Skrine & Co. returned the two cheques to Raya Realti, saying that the six defendants were not proceeding with the sale unless and until the plaintiffs' private caveat was removed.

[19] The intervener-plaintiffs obtained leave to appeal on three leave-questions. It is expedient to deal first with Questions 2 and 3.

Questions 2 And 3

[20] These relate to the deficiency of RM35 and are as follows:

> 2. Whether an acceptance by the vendor of a sum that is marginally less than the strict calculation of 10% of the purchase price constitutes a waiver of the marginal difference and estops the vendor from raising the said non-payment of the said marginal difference as a defence to specific performance;
>
> 3. Whether in any case, the *de minimis* rule applies to such a marginal difference.

[21] The question of the deficiency was not raised in the six defendants' defence or during the trial and no evidence was led on it. It was raised only during submission. The trial judge ignored it. He only dealt with the six defendants' pleaded defences as to Raya Realti's status and authority, which were their only pleaded defences. The Court of Appeal, however, said concerning the deficiency: "It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with".

[22] The intervener-plaintiffs' counsel went to great lengths to point out various circumstances to persuade us that they show that the parties had always proceeded on the basis that the sum of RM35,000 was acceptable as full satisfaction of ten per cent of the total purchase price. We will not set out the circumstances and will only say that it is clear to us that that was the case. They amounted to a waiver of the RM35. If that had not been the case the six defendants would have raised the deficiency as a defence. We wish particularly to mention that on 9 October 1988 Raya Realti, in forwarding to Skrine & Co. the cheque for RM17,500 in their name, also forwarded, in a form, the particulars of the vendor and purchaser. In that form the purchase price was given as "$350,000 (Approx)" and the deposit was given as "$35,000 (10%) (Approx)". It is a clear indication that Raya Realti, as the six defendants' agent, were not concerned to fix the deposit at the exact sum of RM35,035.

[23] We would therefore answer Question 2 in the affirmative. There is no need to answer Question 3 to decide in favour of the intervener-plaintiffs the question of the deficiency.

Question 1

[24] This question is as follows:

> Whether after the grant of an option to purchase land a vendor can unilaterally repudiate the option, after the due exercise of the option, on the ground that the caveat has been lodged by a third party.

[25] It arose from the following statement in the Court of Appeal's judgment:

> I am also of the view that the returning of the two cheques ... by Messrs. Skrine & Co. to (Raya Realti) *vide* their letter dated 19.10.1988 would show that there was no acceptance of the ten per cent deposit.

As has been stated, those cheques were returned because the six defendants did not wish to proceed with the sale because of the presence of the plaintiffs' private caveat.

[26] In our judgment, provided the option had been exercised in time, there was a binding contract, and the lodging of the caveat did not entitle the six defendants to refuse to proceed with the sale. All that the intervener-plaintiffs had to do to exercise the option and turn it into a binding or absolute contract was to tender payment of the ten per cent deposit by 18 October 1988. This they did. That the six defendants' solicitors chose not to bank in the cheques but instead to return them to Raya Realti did not change the fact that the option had been exercised. We respectfully disagree with the Court of Appeal that the return of the cheques signified no "acceptance" of the ten per cent deposit.

[27] We therefore allow the intervener-plaintiffs' appeal.

The Plaintiffs' Appeal

[28] It was on three grounds that the Court of Appeal found that there was no concluded contract and set aside the orders of the High Court in favour of the plaintiffs. Each of the three grounds gave rise to a leave-question, so that there are three leave-questions.

Question 1

[29] Question 1 is as follows:

> 1. When a sale and purchase of land is by way of an oral agreement and such transaction is done through an option to purchase whether such an option to purchase can be treated merely as evidence which does not require to be specifically pleaded.

[30] We wish to say at the outset that it is clear to us that, on the evidence, it was only on the second option dated 10 October 1988 that the plaintiffs could base their claim against the six defendants. The option contained sufficient essential terms for it,

in ordinary circumstances, to become a binding or absolute contract upon payment of the required sum by the due date, whether or not a formal and elaborate sale and purchase agreement was to follow.

[31] The plaintiffs, however, in their brief seven-paragraph statement of claim, did not plead the option as the basis of their claim but pleaded instead an oral agreement of the same date and terms as to price and payment of ten per cent of the total purchase price as in the option. This may be seen in paras 3 and 4 of the statement of claim. But there was no evidence of any oral agreement. There was only the option, the second option. It would appear as though the drafter of the statement of claim treated the option as an oral agreement, because if references to the alleged oral agreement throughout the statement of claim were to be substituted with references to the option, the statement of claim would reflect the actual position.

[32] The six defendants, however, knew that they had to answer a claim based on the second option. This may be seen in their reply to para 6 of the statement of claim where the plaintiffs averred that, despite requests by the plaintiffs, the six defendants failed to take any steps towards completion of "the said agreement", which, according to the statement of claim, was the alleged oral agreement. The six defendants' reply in para 6 of their amended defence was to admit that there were requests by the plaintiffs for completion of "the alleged agreement" while, however, contending they were not obliged to comply for reasons given earlier in the amended defence. By admitting that there were requests for completion of "the alleged agreement" the six defendants evinced their understanding or acceptance that the agreement alleged by the plaintiffs was the option. Although para 4 of the amended defence denied para 3 of the statement of claim, which is the paragraph that introduced the oral agreement allegedly made through Raya Realti, the denial was not a denial that made an issue of the form of the agreement, but was a denial of the existence of any agreement on the part of the six defendants on the ground that Raya Realti were not acting as their agent. The six defendants therefore knew the case that they had to meet and were not embarrassed or misled by the plaintiffs' averment of an oral agreement.

[33] In the High Court, the submissions were in writing. As between the plaintiffs and the six defendants, the six defendants submitted first. It is apparent from the written submission of their counsel that although the statement of claim pleaded an oral agreement, counsel recognized from the evidence that it was the second option that was the basis of the plaintiffs' claim, and no issue was made of the failure to plead the option. It was in his written submission in reply to the plaintiffs' written submission that the six defendants' counsel made an issue of the failure to particularize the oral agreement and plead the option.

[34] The learned trial judge in his judgment paid no heed to the issue, probably treating it as of no significance, and adjudged the case on the basis that the plaintiffs' claim was "premised on the option document". The Court of Appeal, however, took the view that the trial judge's "failure to consider the pleaded case", that is, the case as based on an oral agreement, "but deciding on an unpleaded case", that is a case as based on the option, "is a clear misdirection", on account of which the appellate court "has a duty to intervene".

[35] The submission of the plaintiffs' counsel in this court on this matter of pleading was, to our understanding, that there was actually no oral agreement, but the alleged oral agreement was merely a notional emanation from the option that was necessary to bring into the pleading, which was admitted to be inelegant, in a situation in which there was no formal written sale and purchase agreement. It is as though the thinking was that in the absence of a formal sale and purchase agreement there could only have been in existence an oral agreement. The option, so went the submission, was merely evidence of the existence of an oral agreement, and evidence is never pleaded in a pleading.

[36] Question 1, which is predicated primarily on the existence of an oral agreement, might be answered in the affirmative as a general question, but the answer cannot serve the case of the plaintiffs because in their case there was no oral agreement or sale and purchase by way of an oral agreement.

[37] Nevertheless, in our judgment, the learned trial judge was right in not paying heed to this pleading issue, and we do not agree with the Court of Appeal that he had misdirected himself in this respect. The purpose of a pleading is to enable the other

party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. In this case, as we have shown, the plaintiffs' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the very outset they knew that it was the second option that was the true basis of the plaintiffs' claim. This is nothing but a trivial issue.

Question 2

[38] Question 2 is as follows:

> 2. In a case of sale and purchase of land, when there are two options given by the vendor to two different parties, can the one option be treated as conditional upon non-performance of the other option.

[39] In para 2 of their amended defence to the plaintiffs' claim the six defendants averred that prior to the granting of the second option Raya Realti had represented to the plaintiffs that their option had to be conditional and subject to the prior rights of the holders of the first option. This averment was supported by the evidence of Rajandran a/l Kovalpichay, the sole proprietor of Raya Realti, who said that when he gave the option he made it clear to the plaintiffs that it was a conditional option to become effective if the intervener-plaintiffs "failed to complete the transaction". He explained that despite having given the first option, he nevertheless gave the second option because "as an agent I wanted a back up in case the interveners could not proceed with the purchase of the land".

[40] The learned trial judge did not address the question of the second option being conditional on the first option. The Court of Appeal, however, said as follows:

> ... I find the learned trial judge failed to address this aspect of the case. In fact on this point evidence was led by (Raya Realti) through its witness, Rajandran a/l Kovalpichay (DW2). (See pages 333-335 of Appeal Record Volume II)). It is my judgment had the learned trial judge adequately approached this point as an issue before him, he would have found that the facts do not support his finding that there was a concluded contract. This is because at that point of time when the offer under the said Option was said to be made by the plaintiffs, the offer by the first and second

intervener plaintiffs under the same said Option was still subsisting. It is my considered view when the condition in the said Option is not satisfied there can be no concluded contract. (See the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy* [1996] 3 MLJ 385).

[41] The gist of the submission of the plaintiffs' counsel on Question 2 is that the second option cannot be treated as conditional upon the non-performance of the first option because the two options must be construed according to their terms and there was no term in the second option that provided that it was a conditional option. Counsel submitted that it was a misdirection on the part of the Court of Appeal to rely on the evidence of Rajandran to find that the second option was subject to the first option because in so relying the Court of Appeal "disregarded the strictures" of ss. 91 and 92 of the Evidence Act 1950.

[42] The plaintiffs' counsel also sought to show, by reference to other aspects of Rajandran's evidence and in the light of the evidence of other witnesses, that the Court of Appeal ought not to have accepted as factual Rajandran's evidence. But this is a question of fact which Question 2 gives us no warrant to examine for the purpose of finding that the Court of Appeal was not justified in relying on the evidence of Rajandran. We have to proceed on the basis that, as the Court of Appeal accepted, Rajandran did tell the plaintiffs that the option was a conditional option. What we have to consider for Question 2 is whether, as contended by the plaintiffs' counsel, the Court of Appeal, in relying on the evidence of Rajandran, acted contrary to ss. 91 and 92 of the Evidence Act 1950.

[43] In our opinion they did not. Those sections are concerned with, *inter alia*, "the terms of a contract" that "have been reduced by or by consent of the parties to the form of a document". The option was a conditional contract: see *Subramaniam Chettiar & Ors v. J.C. Chang Ltd* [1969] 2 MLJ 176. Section 92 would preclude the admission of evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the option, but there are exceptions. Proviso (c) to the section provides that "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract ... may be proved". The legal effect of what Rajandran told the plaintiffs is that before the

six defendants would be bound by any obligation under the second option to honour it, the first option must first fail to be exercised. The failure to exercise the first option was the condition precedent to the attaching to the six defendants of their obligation under the second option to honour it. The proviso allows proof to be given of a separate oral agreement constituting the condition precedent. That there was such an oral agreement in this case is to be inferred from the fact that when granting the option Rajandran imposed the oral condition and the plaintiffs nevertheless accepted the option.

[44] As the second option was subject to the first option, and as the first option was exercised in time, the second option ceased to be binding on the six defendants.

[45] Question 2 is actually inappropriate for this case. It assumes, without more, the existence of two options given to two different parties. It overlooks the fact that in this case, as the Court of Appeal found, one option was in fact conditional. As it stands, the question might well be answered in the negative. But one option could, as in this case, be made conditional upon the non-exercise of the other. Indeed it is important that it should be so made, so that the vendor would not end up being liable to two purchasers.

[46] We therefore dismiss the plaintiffs' appeal without having to deal with Question 3, which relates to the question of payment of the ten per cent of the total purchase price by the plaintiffs and which is as follows:

> 3. Whether [the] court is entitled to rely on the opinion of a text book to arrive at a finding of fact as to when a cheque is cleared.

[47] Since the outcome of these appeals is that the plaintiffs fail in their claim and the intervener-plaintiffs succeed in theirs, it follows that the plaintiffs' appeal against the Court of Appeal's dismissal of their cross-appeal in the Court of Appeal for specific performance automatically fails, and there is no need to consider the submissions on the question who, as between the plaintiffs and intervener-plaintiffs, should be granted specific performance.

[48] To conclude, we allow the appeal of the intervener-plaintiffs (the holders of the first option, Sundaram a/l Marappa Goundan and Selva Balan a/l Sinnan) with costs against the six defendants here and in the Court of Appeal and set aside the order of the Court of Appeal setting aside the order of specific performance made in favour of the intervener-plaintiffs. We dismiss the appeal of the plaintiffs (the holders of the second option, Karuppannan a/l Ramasamy and Amchiappan a/l Sellapan) with costs for the six defendants. This means, as regards the plaintiffs' private caveat, that the Court of Appeal's order for its removal is extant. We also dismiss the plaintiffs' appeal as regards specific performance, which was a fight between the plaintiffs and the intervener-plaintiffs, but we order no costs for the intervener-plaintiffs. We order a refund of the intervener-plaintiffs' deposit and order that the plaintiffs' deposit be paid to the six defendants to account of their taxed costs.